UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

VERNITA MIRACLE-POND and SAMANTHA PARAF, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SHUTTERFLY, INC.,

Defendant.

Civil Action No. 1:19-cv-4722

District Judge Mary M. Rowland

PLAINTIFFS' MOTION FOR CURATIVE MEASURES TO REMEDIATE EFFECTS OF DEFENDANT'S IMPROPER COMMUNICATONS WITH PLAINTIFF AND PUTATIVE CLASS MEMBERS

I. INTRODUCTION

Plaintiff requests that the Court intervene to undo the prejudice that Shutterfly caused the class members to suffer when it unilaterally and surreptitiously forced them into purported arbitration agreements after the filing of this class action.

Three months after plaintiffs filed this class action, Shutterfly, without any notice to Plaintiffs' counsel, or the Court, sent an email to Plaintiff Vernita Miracle-Pond, and class members purporting to bind them to individual arbitration of all claims unless they closed their accounts within a month. The communication made no mention of the pending class action.

After first learning of this abuse, Plaintiffs' counsel sought Shutterfly's cooperation to undo it. Shutterfly refused.

> Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.
>
> [C]ourts have repeatedly used this authority to bar or invalidate class action waivers and arbitration clauses procured from potential class members who were not provided adequate notice of the pending action.

Brodsky v. HumanaDental Ins. Co., No. 10-cv-3233, 2016 WL 5476233, at *12 (N.D. Ill. Sept. 29, 2016), *class decertified on other grounds*, 269 F. Supp. 3d 841 (N.D. Ill. 2017); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)

Plaintiffs move the Court to order immediate curative notice to putative class members and other remedial actions, as fully set forth below. Plaintiffs further request that this Motion be considered and decided in conjunction with Shutterfly's pending Motion to Compel Arbitration (ECF 19.)

II. PROCEDURAL BACKGROUND

Plaintiffs Vernita Miracle-Pond and Samantha Paraf ("Plaintiffs") brought this putative class action in Illinois state court on June 11, 2019, alleging that Shutterfly violated the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* by employing "facial recognition" on photographs uploaded to the Shutterfly website within the state of Illinois. Class members include all Illinois residents who uploaded photographs to Shutterfly within the state of Illinois, whose photos were then used by Shutterfly to create "scans of face geometry" for the purpose of facial recognition. (ECF 1.) Shutterfly removed the action to this Court on July 12, 2019. *Id.*

On October 3, 2019, Shutterfly filed a Motion to Dismiss against both Plaintiffs and a Motion to Compel Arbitration against Ms. Miracle-Pond only. (ECF 16 and 19, respectively.) (Ms. Miracle-Pond has been a Shuttterfly user since 2014; Ms Paraf has never had a Shutterfly account.) Plaintiffs have opposed both motions. (ECF 36 and 37, respectively.) Shutterfly's Motion to Compel Arbitration is based on an arbitration clause added to Shutterfly's Terms of Use ("ToU") in 2015, after Ms. Miracle-Pond established her account.

In its Memorandum in Support of Motion to Compel Arbitration (ECF 21) ("Def. Arb Memo"), Shutterfly revealed for the first time that in September 2019, while this action was pending, Shutterfly sent an email to all of its users (the "September 2019 Email" or the "Email"), including Plaintiff Miracle-Pond and members of the putative class, that purported to inform recipients about modifications to Shutterfly's ToU, including a modification to the arbitration clause that had been added to the ToU in 2015.[1] The Email further stated: "If you do not contact us to close your account by October 1, 2019, or otherwise continue to use our websites and/or

[1] Shutterfly's September 2019 Email, attached hereto as Exhibit A for the Court's convenience is Exhibit 1 to the Declaration of Don Michael Berry in Support of Shutterfly's Motion to Compel Arbitration and Stay Litigation. (ECF 22.)

mobile applications, you accept these updated terms." Shutterfly does not claim to have notified its users of the addition of the arbitration clause at any time between 2015, when the clause was added, until the Email. (Def Memo at 4.)

Shutterfly claims that Ms. Miracle-Pond "accepted Shutterfly's arbitration clause . . . by choosing not to close her account after receiving [the September] email notice of the clause." (Def Memo at 10 (emphasis added).) Thus, Shutterfly admits that, while this action was pending in federal court, it sent an *ex parte* communication to Plaintiff Miracle-Pond and putative class members that—according to Shutterfly—resulted in Ms. Miracle-Pond and other class members forfeiting their legal right to pursue this action. Shutterfly admits it failed even to inform class members of the existence of this action, let alone alert class members that they might be waiving their rights in this action if they did not close their accounts by October 1, 2019 or otherwise used the Shutterfly website.

Plaintiffs have opposed Shutterfly's Motion to Compel Arbitration on numerous grounds, including that Ms. Miracle-Pond never agreed to Shutterfly's ToU, never received notice that an arbitration clause had been added to Shutterfly's ToU after she joined in 2014, and that the September 2019 Email was inadequate, improper, misleading, and deceptive. (ECF 37 ("Pl Opp").) Plaintiffs informed Shutterfly of their position that, in addition to the impropriety of the Email being ground for denial of Shutterfly's Motion to Compel Arbitration, remedial measures are appropriate and necessary to address the impacts of the Email and ensure that the rights of class members are protected as this litigation progresses. The parties met and conferred. Shutterfly's position was that the Email was not improper and, therefore, no remedial actions are required.

For the reasons set forth below, Shutterfly's September 2019 Email was improper, misleading, and prejudicial to Plaintiff Miracle-Pond and putative class members. Plaintiffs, therefore, move this Court for an Order remediating the impacts of Shutterfly's Email and ensuring

that Shutterfly will not engage in improper and misleading communications with class members in the future. The remedial measures Plaintiffs seek (*see infra*, Section V) are the least restrictive measures that will ensure that the prejudicial effects of the Email are cured and the rights of class members are protected in the future, in accordance with the goals and policies underlying Federal Rule of Civil Procedure ("Rule") 23.

III. FACTUAL BACKGROUND

When Plaintiff Miracle-Pond established her Shutterfly account in 2014, Shutterfly's ToU contained no arbitration clause. (ECF 23-2.) Shutterfly's motion to compel arbitration is wholly premised on the claim that Ms. Miracle-Pond is bound by an arbitration provision Shutterfly added to its ToU in 2015 pursuant to a "unilateral modification" clause in the 2014 ToU, pursuant to which Shutterfly rendered unto itself the purported right to unilaterraly alter any provision without notice. Shutterfly made no effort to notify its users of the arbitration provision inserted in 2015 until it sent the September 2019 Email – four years after the clause was added to the ToU and three months after Shutterfly was served with the summons and class action complaint in this case.

Ms. Miracle-Pond never assented to Shutterfly's ToU (including the unilateral modification clause and class action waiver) when she registered in 2014. The ToU were presented to Plaintiff in the form of a "browsewrap" agreement that purported to become binding if Plaintiff ever visited or used the Shutterfly website. Plaintiff was not required to view the ToU before opening her account and had no actual or constructive notice of any of the terms of the ToU. Thus, Plaintiff did not assent to the ToU (which did not, in any event, include an arbitration clause). (*See* Pl Opp at I(A).)

Even if Plaintiff had assented to the 2014 ToU (which she did not), Shutterfly's furtive attempt to insert an arbitration clause into the ToU in 2015 and in subsequent versions, without clear and conspicuous notice, would render the arbitration clause unenforceable. Third, the added

arbitration clause is illusory and unenforceable because it would be subject to unilateral modification without notice, and because it would permit modifications to affect already-pending disputes. (*See* Pl Opp at I(B)-(C).)

Plaintiffs claim that Shutterfly's September 2019 Email did not create a binding agreement requiring class members to arbitrate this dispute because (i) the Email did not provide clear and conspicuous notice of the arbitration clause; (ii) a unilaterally imposed arbitration clause cannot be applied retroactively to pending disputes; (iii) by requiring account closure to avoid agreement to the ToU, Shutterfly violated the ToU; and (iv) because the Email was an improper and misleading communication that cannot deprive Plaintiff or class members of their right to proceed in this Court. (Pl Opp at I(D)(1)-(4).)

Most significant for purposes of this Motion, Shutterfly claims that the September 2019 Email had the effect of binding class members to the modified ToU, including the arbitration clause and class waiver provision, if they failed to close their accounts by October 1 or "otherwise continued using [Shutterfly's] websites or mobile applications" after receiving the Email. Whatever the Court ultimately decides about the validity of Shutterfly's arbitration clause, Shutterfly's claim regarding the effect of the Email leaves no doubt that the Email was an *ex parte* communication calculated to eliminate putative class members' rights in this litigation, that it will result in confusion among class members as to their roles and rights to participate in this class action and, in addition, will discourage some class members from participating in the class. Thus, Shutterfly's September 2019 Email was improper and curative measures are required to reverse its effects.[2]

[2] To the extent Shutterfly argues that the Email was not improper because the *modifications* to the arbitration clause, of which the Email purportedly gave notice, were minor, technical changes that do not alter class members' obligation to arbitrate, this argument should be rejected out of hand. Shutterfly claims that by failing to close her Shutterfly account in response to the Email, Ms. Miracle-Pond "accepted

IV. ARGUMENT

A. The Court Has Broad Authority to Regulate Shutterfly's Communications With Absent Class Members.

The Supreme Court has long recognized that because "of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and enter appropriate orders governing the conduct of counsel and parties." *Brodsky*, 2016 WL 5476233, at *12 (quoting *Gulf Oil Co.*, 452 U.S. at 100). Rule 23(d) empowers the court at any point after the filing of a class action to enjoin a defendant's communications with absent class members and to correct the effect of prior communications. *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, No. 13-cv-3826, 2013 WL 6407583, at *7 (N.D. Cal. Dec. 6, 2013) ("This discretion includes requiring the issuance of corrective notices and action to ameliorate confusing or misleading communications."); *Weight Watchers, Inc. v. Weight Watchers Int'l, Inc.*, 53 F.R.D. 647, 650 (E.D.N.Y. 1971) (holding that Rule 23 "confide[s] in the federal judiciary a wide range of discretion to prevent abuse in class actions or to issue remedial orders where abuse has already occurred").

"[T]o protect the integrity of the class and the administration of justice generally," a court's authority under Rule 23(d) extends to "communications that mislead or otherwise threaten to influence the threshold decision whether to remain in the class," as well as to those that "seek or threaten to influence [one's] choice of remedies." *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988); *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985) ("When confronted with claims pressed by a plaintiff class, it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests. Such conduct

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Shutterfly's *arbitration clause*" in its entirety, not merely some minor technical modifications to the arbitration clause. (Def Memo at 4.)

reduces the effectiveness of the 23(b)(3) class action for no reason except to undermine the purposes of the rule.") (citation omitted); *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 569 (S.D.N.Y. 2004) ("*Currency Conversion I*") ("[E]xercis[ing] supervisory authority over a defendant's communications with putative class members . . . is particularly apt where a defendant attempts to alter the contours of the litigation or the availability of remedies.").

A court may base its decision on the timing and purpose of the defendant's communication. But courts also consider whether the defendant informed class members of the pending case, accurately summarized the claims and rights at issue, or provided the plaintiffs' counsel's contact information—the failure to do any one of which may render a communication misleading. 2 McLaughlin on Class Actions § 11:1 (14th ed. 2018) (collecting cases).

B. Shutterfly's September 2019 Email was Deceptive, Misleading, and Improper and the Court Should Invalidate it and Order Remediation.

Courts nationwide invalidate arbitration agreements, releases, and class action waivers secured by defendants' improper communication with class members and, if warranted, order curative notice and other remedial measures to safeguard the rights of class members. Shutterfly's September 2019 Email, sent while this litigation was pending, purported to give class members notice of Shutterfly's arbitration clause and then require them to arbitrate individually the claims raised in this pending class action if they failed to close their Shutterfly accounts or "otherwise continue[d[to use [Shutterfly's] websites and/or mobile applications." (*See* Ex. A.) The Email was highly improper. The Court should order curative notice and the other remedial measures requested *infra* at Section V.

1. <u>The Court Should Invalidate Shutterfly's Attempt to Bind Absent Class Members to Arbitration and Order Remediation</u>.

Shutterfly claims that Plaintiff Miracle-Pond—and, by extension, thousands of unnamed putative class members—"accepted Shutterfly's arbitration clause … by choosing not to

close her account after receiving [the September 2019] email notice of the clause." (Def Memo at 10.) Shutterfly sent the Email approximately three months after the Complaint in this case was filed on June 11, 2019 (ECF 1). Despite having been served with process months earlier, Shutterfly failed even to advise class members of the existence of this class action, let alone provide an adequate description of the litigation and the rights of putative class members. Courts, including in this District, have repeatedly used their discretionary authority to bar or invalidate class action waivers and arbitration clauses procured from potential class members who were not provided adequate notice of the pending action.

For example, in *Brodsky*, the court rejected defendant's attempt to bar potential plaintiffs from the class by issuing amended arbitration agreements. 2016 WL 5476233, at *12. There—as here—the defendant argued that its amended agreement bound putative class members to arbitration and excluded them from the litigating class; however, there—as here—the defendant failed to inform the recipients of the pending litigation or that the recipients might be potential plaintiffs or class members. *Id.* The court in *Brodsky* held invalid the defendant's "attempt to subvert the integrity of the class certification process" and noted that such activity was "not well taken."[3] *Id.*

Similarly, in *Piekarski v. Amedisys Illinois, LLC*, the defendants sent self-executing waivers to potential class members purportedly binding them to arbitration during pendency of the litigation. 4 F. Supp. 3d 952, 954 (N.D. Ill. 2013). There—as here—the defendants notified

[3] Any effort by Shutterfly to distinguish *Brodsky* based on the fact that Shutterfly, unlike defendant in Brodsky, originally added the arbitration clause to its ToU before this litigation was filed would be specious. This is a distinction without a difference. Shutterfly added the arbitration clause in 2015 but did not make any effort notify its users of the clause until the September 2019 Email. Due to this four-year failure to give notice, the impact of Shutterfly's attempted use of the Email to bind users to the arbitration clause would be the same whether the arbitration clause was added in 2015 or one day before the Email was sent.

potential plaintiffs of its newly-implemented arbitration policy through an email that contained "little to no information about the arbitration program," and there—as here—the defendants required them to opt out within 30 days if they did not agree to be bound by the arbitration agreement. *Id.* The court in *Piekarski* held that the defendants' communication was likely to cause confusion to potential class members because "it did not require an employee to sign the documents before [the arbitration provision] became effective." *Id.* at 956 (citing *Williams v. Securitas Sec. Servs. USA, Inc.*, No. 10-cv-7181, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011).) The *Piekarski* court remedied the defendants' "abusive tactics" by invalidating the arbitration agreement, ordering the defendants to send corrective notice to putative class members, and ordering defendant to provide plaintiff the names, addresses and email addresses of all Illinois class members who received the arbitration agreement as well as any "opt-out" forms defendant received. *Id.* at 956-57. Plaintiffs here seek similar remedial measures. *See infra* Section V.

In the *Currency Conversion Fee Antitrust Litigation*, the court found defendant's communication of an arbitration agreement to putative class members misleading where defendant omitted the "critical information," including that there was ongoing litigation and that "by failing to reject the arbitration clause, they were forfeiting their rights as potential plaintiffs." 361 F. Supp. 2d 237, 254. (S.D.N.Y. 2005) ("*Currency Conversion II*"). That court previously held that, "the arbitration clauses [could] not be enforced because [d]efendants modified the cardholder agreements after this [litigation] commenced." *Currency Conversion I*, 224 F.R.D. at 570. "Regardless of any cardholders' knowledge of this action," under Rule 23(d), the agreements were unenforceable specifically because of the suspect timing. *Id.* Other courts have ruled similarly.[4]

[4] *See, e.g., Tomkins v. Amedisys, Inc.*, No. 12-cv-1082, 2014 WL 129401, at *2 (D. Conn. Jan. 13, 2014); *Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 923-24 (11th Cir. 2014); *Marino v. CACafe, Inc.*, No. 16-cv-6291, 2017 WL 1540717, at *3 (N.D. Cal. Apr. 28, 2017); *DeGidio v. Crazy Horse Saloon & Restaurant, Inc.*, No. 13-cv-2136, 2017 WL 5624310, at *7-8 (D.S.C. Jan. 26, 2017), *aff'd*, 880 F.3d 135

Here, as in *Brodsky*, *Piekarski*, and the other cited cases, Shutterfly's efforts to force putative class members to arbitrate their claims—while providing no notice or information about this case—have subverted the protections of Rule 23(d). Shutterfly's vague and misleading communication has a serious likelihood of preventing putative class members from making informed decisions about their participation in this litigation as it progresses because they cannot know whether they are required to arbitrate their claims, as Shutterfly claims. Thus, Shutterfly's improper conduct provides multiple grounds under Rule 23(d) to invalidate any purported waiver of rights.

2. The Court May Invalidate Communications on the Basis of Their Post-Filing Execution.

In recognition that its earlier furtive attempt to alter the ToU to include an arbitration provision was wholly unenforceable, Shutterfly sent its Email in Sepember 2019 attempting to obligate putative class members to arbitrate their claims after this case was filed. This alone provides the Court with sufficient reason to invalidate Shutterfly's "notice" of the arbitration provision from its September 2019 Email at issue. *Currency Conversion I*'s reasoning applies with equal force here. Even though Shutterfly amended its ToU to include mandatory arbitration of claims, Shutterfly did not notify its users of the arbitration clause until September 2019, three months after commencement of this case. On this basis alone, this Court should deem Shutterfly's purported notice of its arbitration clause invalid.

(4th Cir. 2018); *Cheverez v. Plains All Am. Pipeline, LP*, No. 15-cv-4113, 2016 WL 861107, at *7 (C.D. Cal. Mar. 3, 2016); *Jimenez v. Menzies Aviation, Inc.*, No. 15-cv-2392, 2015 WL 4914727, at *6 (N.D. Cal. Aug. 17, 2015); *O'Connor*, 2013 WL 6407583, at *7; *Balasanyan v. Nordstrom, Inc.*, No. 11-cv-2609, 2012 WL 760566, at *1–2, 4 (S.D. Cal. Mar. 8, 2012); *Williams*, 2011 WL 2713741, at *2; *County of Santa Clara v. Astra USA, Inc.*, No. 05-cv-3740, 2010 WL 2724512, at *6 (N.D. Cal. July 8, 2010).

3. Shutterfly's Failure to Disclose the Existence of This Pending Class Action Also Warrants Voiding Shutterfly's Notice of The Arbitration Clause.

Beyond its suspect timing, Shutterfly's failure to disclose the existence of this litigation in its September 2019 Email is a misleading and improper attempt to secure unknowing waivers of the right to litigate claims. This provides an additional, independent basis for the Court to void Shutterfly's purported notice of binding arbitration.

Courts routinely strike agreements where the defendant fails to apprise class members of the pending case in which they would be forfeiting participation. For example, in *Balasanyan*, the defendant employer provided employees with a four-page document with a section entitled "Dispute Resolution Agreement," which mandated arbitration, and sought employee signatures directly underneath. 2012 WL 760566, at *2. While that defendant included a much clearer expression of the dispute resolution mechanism than Shutterfly did here, the court nonetheless invalidated the arbitration agreements because of the post-filing timing and because the defendant "did not alert putative class members of the litigation." *Id.* at *3.

Other courts have similarly invalidated agreements—whether they are for arbitration or a release of claims—based on a defendant's failure to inform class members of the existence of pending litigation. *See, e.g.*, *Jimenez*, 2015 WL 4914727, at *5 (finding unenforceable a post-litigation agreement where the defendant did not inform putative class members of the pending litigation); *Cheverez*, 2016 WL 861107, at *4 ("The First Release was misleading because it failed to notify victims that these class actions existed.").

Balasanyan, *Jimenez*, and *Cheverez* underscore the gravity of Shutterfly's improper communications. Shutterfly provided no information whatsoever about the pending case to putative class members. On this basis alone, the Court should invalidate Shutterfly's "notice" of its arbitration provision.

4. Shutterfly's Failure to Provide Plaintiffs' Counsel's Contact Information Also Justifies Voiding Notice of The Arbitration Clause.

The Court should also consider Shutterfly's "notice" of the arbitration clause invalid because Shutterfly did not provide potential class members an opportunity to consult with Plaintiffs' counsel to make an informed choice as to whether to accept the arbitration clause and waive their right to litigate this case. Following Rule 23(d), courts routinely hold that agreements "are misleading where they do not permit a putative class member to fully evaluate his [or her] likelihood of recovering through the class action." *Cheverez*, 2016 WL 861107, at *4. Consulting with attorneys for the plaintiff class aids class members in considering how to act when presented with an agreement that will waive their rights.

Here, just as Shutterfly never even listed the name of this pending case in the September 2019 Email, it likewise never provided Plaintiffs' counsel's contact information. This omission also stands as an independent ground to strike all of the waivers arising out of potential plaintiffs' failure to close their Shutterfly accounts. *See id.* ("Although the Second Release notifies victims that a consolidated class action exists, it does not provide additional information, such as . . . the contact information for Plaintiffs' counsel."); *Camp v. Alexander*, 300 F.R.D. 617, 625 (N.D. Cal. 2014) (striking pre-certification waivers of participation where "key information, such as plaintiffs' counsel's contact information and a full description of the claims or the complaint" was missing); *Astra USA, Inc.*, 2010 WL 2724512, at *4 (invalidating release under Rule 23, because, "[w]hile there were not any alleged misstatements," it "omit[ted] a summary of the plaintiffs' complaint," and "it did not even provide an explanation of the claims of the plaintiffs, the plaintiffs' counsel's contact information, or the current status of the case"). The Court should therefore invalidate Shutterfly's purported "notice" contained in its Email.

5. Shutterfly's "Notice" of the Arbitration Clause in its ToU was Vague and Misleading.

Setting aside Shutterfly's omissions with regard to the pending litigation, Shutterfly's reference to arbitration in its September 2019 Email—and the basis for Shutterfly's claim that certain of the class members are subject to mandatory arbitration—was simply unclear. The focus of the Email was privacy. The lead sentence was, "We're updating our Privacy Policy and Terms of Use, reflecting our ongoing commitment to be transparent about how we use your data and keep it safe." (Ex. A.) Shutterfly's only reference to arbitration in the entire Email was limited to a single sentence, roughly two-thirds of the way down the page, reading: "We also updated our Terms of Use to clarify your legal rights in the event of a dispute and how disputes will be resolved in arbitration." (*Id.*) This statement refers to changes in how disputes are handled in arbitration. The statement does not even remotely suggest that all disputes must be resolved in arbitration. For this reason alone, this Court should rule inadequate and invalidate the purported "notice" of binding arbitration contained in Shutterfly's Email.

C. Curative Notice is Necessary to Rectify the Harm Caused by Shutterfly.

Where abuses have occurred, courts have wide authority to fashion protections for class members. *See, e.g.*, *Sloan v. Ameristar Casinos, Inc*., No. 12-cv-1126, 2013 WL 1127062, at *2-3 (D. Colo. Mar. 18, 2013) (ordering sanctions including monetary penalty, corrective notice, extended opt-in period, and apology from employer's COO for coercive communications to potential opt-ins); *Quezada v. Schneider Logistics Transloading & Distribution*, No. 12-cv-2188, 2013 WL 1296761, at *7 (C.D. Cal. Mar. 25, 2013) (prohibiting defendant's communications with class members, striking defendant's 106 declarations, and ordering curative notice); *Zamboni v. Pepe West 48th Street LLC*, No. 12-cv-3157, 2013 WL 978935, at *4 (S.D.N.Y. Mar. 12, 2013) (ordering corrective notice and extension of opt-in period, where defendant secured signed

statements from opt-ins); *Bonanno v. Quiznos Master LLC*, No. 06-cv-2358, 2007 WL 1089779, at *4 (D. Colo. Apr. 10, 2007) (ordering curative notice and production of list of class members with whom had defendant communicated); *Goody v. Jefferson County*, No. 09-cv-437, 2010 WL 3834025, at *4 (D. Idaho Sept. 23, 2010) (requiring corrective notice where defendant's communications with potential class members caused confusion about right to join suit); *Wright v. Adventures Rolling Cross Country, Inc*., No. 12-cv-982, 2012 WL 2239797, at *6-7 (N.D. Cal. June 15, 2012) (granting corrective notice and prohibiting defendants from making contact with putative class members).

Here, the Court should order Shutterfly to send curative notice to its customers to clarify the confusion regarding the possible waiver of litigation rights generated by its Email. Without such curative notice, Shutterfly customers may have unwittingly subjected their claims to mandatory arbitration—a result that should only arise out of both parties' agreement to arbitrate. Shutterfly's unilateral, vague, and misleading "notice" of its mandatory (and purportedly retroactive) arbitration clause should be clarified for Shutterfly's customers, and Shutterfly's customers should be fully informed of the pending litigation and their rights thereto. Plaintiffs, their counsel, and the Court have an interest in protecting absent class members by ensuring that they are not misled and do not unknowingly waive their right to participate in this case. The least burdensome manner of accomplishing this is through the relief requested by Plaintiffs in this Motion. Thus, the curative notice sought by Plaintiffs, set forth in Exhibit A, is consistent with this Court's duty to protect the class members and the integrity of the class action process.

V. RELIEF REQUESTED

Plaintiffs respectfully request that the Court enter an Order:

(1) Declaring that Shutterfly's September 2019 Email to putative class members was misleading and improper to the extent it purported to provide notice of the arbitration clause in Shutterfly's Terms of Use;

(2) Declaring that the Court will regulate Shutterfly's future communications with putative class members to ensure that communications relating to Shutterfly's Terms of Use, arbitration, dispute resolution, this litigation, or any potential impact to the rights of putative class members in this litigation are not misleading;

(3) Requiring that any proposed future communications between Shutterfly and class members be provided to Plaintiffs' counsel prior to their dissemination to allow Plaintiffs' counsel to take appropriate steps to protect the interests of the putative class members, including submission of the proposed communication to the Court if the parties are otherwise unable to resolve any dispute regarding the proposed communication;

(4) Requiring that, in any communication with putative class members relating to arbitration, dispute resolution, this litigation, or any potential impact to the rights of putative class members in this litigation, Shutterfly disclose the existence and status of this litigation and Plaintiffs' counsel's contact information;

(5) Declaring that no putative class member shall be bound to arbitrate disputes with Shutterfly as a result of the September 2019 Email or any action or inaction by Shutterfly or putative class members on or after the date on which the Email was first sent to putative class members;

(6) Nullifying any changes in Shutterfly's Terms of Use since the inception of this Action;

(7) Requiring that a Court-approved curative notice in the form set forth as **Exhibit B** be sent by Shutterfly at its own expense to all putative class members to whom the Email was sent; and

(8) Requiring Shutterfly to produce to Plaintiffs' counsel, within ten days after the Court's Order on this Motion, the names, mailing addresses, and email addresses of putative class members to whom Shutterfly sent the September 2019 Email; any records Shutterfly may have regarding whether putative class members received or opened the Email; any responses to the Email from putative class members; a list of all putative class members who closed their accounts after receiving the Email; and a list of all putative class members who used Shutterfly's websites and/or mobile applications after receiving the September 2019 Email.

VI. CONCLUSION

For the foregoing reason, Plaintiffs respectfully request that this Motion be granted.

DATED: November 26, 2019

Respectfully submitted,

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